

private mobile radio service licenses.¹⁰⁴ Although rural telephone companies would be eligible, we did not propose to treat them differently than other applicants. We sought comment on these proposals. We also requested that commenters seeking spectrum for non-commercial services (either private mobile radio services or private fixed services) provide as complete information as possible regarding eligibility restrictions that should apply.

59. **Comments.** Bell Atlantic, the only commenter addressing these issues, supports the proposal to impose no categorical restrictions on license eligibility in this band, reasoning that an open policy will help ensure that the entire industry can apply its entrepreneurial talents to the most innovative use of this spectrum.¹⁰⁵

60. **Decision.** We adopt our proposed broad eligibility standards for GWCS applications. Opening the GWCS market to a wide range of applicants will permit and encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure the highest and best use of this spectrum.

G. Competitive Bidding Issues

61. In the Second NPRM, we proposed to use auctions to issue licenses for GWCS services in the 4660-4685 MHz band that meet the statutory auction criteria. We sought comment on a wide range of issues related to competitive bidding.

1. Competitive Bidding Design

a. General Competitive Bidding Principles

62. The Competitive Bidding Second Report and Order, as modified by the Competitive Bidding Reconsideration Order, established the criteria to be used in selecting which auction design method to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly will foster Congress's policy objectives. In this regard, we noted that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the greatest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum.¹⁰⁶

63. Based on this analysis, we concluded that, where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions

¹⁰⁴ 47 U.S.C. § 310(a).

¹⁰⁵ Bell Atlantic Comments at 4.

¹⁰⁶ See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2360-61, para. 70.

would best achieve the Commission's goals for competitive bidding.¹⁰⁷ We also noted, however, that simultaneous multiple round auctions may not be appropriate for all licenses. For example, where there is less interdependence among licenses, there is less benefit to auctioning them simultaneously. Similarly, we explained that, when the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may consider auction designs that are relatively simple, with low administrative costs and minimal costs to the auction participants.¹⁰⁸

b. Competitive Bidding Methodology for Licenses in the 4660-4685 MHz Band

64. **Background.** In the Second NPRM, we proposed to use simultaneous multiple round bidding for licensing of the proposed 5 MHz-wide MTA spectrum blocks. Based on the record and our experience with the auctioning of other licenses, we expected that such licenses would be of sufficient value to warrant the use of simultaneous auctions. We also expressed the view that the value of these licenses for certain contemplated uses would be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions. We also tentatively proposed to auction all licenses simultaneously, because of the relatively high value and significant interdependence of the licenses. We asked commenters to address these tentative conclusions and whether any other competitive bidding designs might be more appropriate for the licensing of this spectrum.

65. **Comments.** In-Flight, the only commenter addressing these issues, supports awarding GWCS licenses in a single, simultaneous auction, in order to provide incentives for companies desiring to provide nationwide service to apply for a GWCS license.¹⁰⁹

66. **Decision.** We will adopt the tentative conclusion in the Second NPRM and auction this spectrum by simultaneous multiple round bidding. This bidding methodology will allow bidders to express the value of the interdependency among licenses better than if licenses are auctioned separately. Moreover, simultaneous multiple round bidding will provide bidders with the opportunity to pursue back-up strategies that enable them most efficiently to obtain the license combinations which satisfy their service needs. Simultaneous multiple round bidding is thus most likely to award GWCS licenses to bidders who value them the most highly and who are most likely to deploy new technologies and services rapidly. We reserve the discretion to hold one or more auctions. In addition, we reserve the discretion to test alternative procedures. We will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

c. Combinatorial Bidding

¹⁰⁷ See id. at 2367, paras. 109-111.

¹⁰⁸ See id. at 2367, paras. 112-113.

¹⁰⁹ In-Flight Reply Comments at 8.

67. Combinatorial bidding is an auction method which allows applicants to bid for multiple licenses as all-or-nothing packages, e.g., all licenses nationwide on a particular spectrum block, with the licenses awarded as a package if the combinatorial bid is greater than the sum of the high bids on the individual licenses in the package.¹¹⁰ In the Competitive Bidding Second Report and Order, we recognized the potential benefits of combinatorial bidding in facilitating aggregations, but expressed concern about the complexity and cost of combinatorial bidding and the potential of such auctions to award licenses in combinations even though they may be of greater value if awarded separately. The advantage of combinatorial bidding is that it might be structured to award spectrum as either multiple or aggregated packages, based on the most valued use. The disadvantages are the complexity and cost of such bidding, and the potential that the procedures chosen will award licenses in combinations even though they might be of greater value if awarded separately.¹¹¹

68. In the Second NPRM, we sought comments on whether to allow combinatorial bidding for GWCS services, because it may be necessary or at least highly desirable that spectrum used for some services (e.g., air-ground service) be licensed to the same entity nationwide. While geographic aggregation is generally facilitated in a simultaneous auction, a business plan that depends critically on winning every regional license on a particular block nationwide may be at a disadvantage absent combinatorial bidding even if it represents the highest-valued use of the spectrum.¹¹² We discussed in the Second NPRM methods to overcome this difficulty, such as allowing the submission of combinatorial bids for all local licenses on the same spectrum blocks, but limiting combinatorial bids to nationwide aggregations in order to address concerns that unlimited combinatorial bidding might prove overly complex. We also discussed methods of addressing "free rider" situations that might result in licenses being assigned to those who value the licenses most highly. We suggested, for example, requiring a 5 percent bidding premium for a combinatorial, nationwide bid to be accepted.¹¹³ We also requested comment on other auction designs, such as the "Electronic Interactive Combinatorial Auction" (EICA) using the "Adaptive User Selection Mechanism" (AUSM) as developed by Banks, Ledyard, and Porter and proposed by NTIA.¹¹⁴

¹¹⁰ Competitive Bidding Second Report and Order, 9 FCC Rcd at 2366-67, paras. 98-115.

¹¹¹ See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2366-67, paras. 98-115.

¹¹² Second NPRM at paras. 89-92.

¹¹³ Id. at para. 91.

¹¹⁴ J. Banks, J. Ledyard & D. Porter, "Allocating Uncertain and Unresponsive Resources: An Experimental Approach," 20 RAND JOURNAL OF ECONOMICS 1 (1989). Ex parte submission of NTIA, Feb. 28, 1994. See also Competitive Bidding Second Report and Order, 9 FCC Rcd at 2365-66, paras. 99-105.

69. **Comments.** In-Flight, the only commenter addressing these issues, supports combinatorial bidding as necessary to allow participation by applicants desiring to provide a nationwide service. In-Flight also proposes that any applicant requiring a nationwide license be permitted to bid for a generic license, without specifying the channel block (or blocks) on which service would be provided. Under this proposal, the applicant for a nationwide license to operate on a single channel block would be the winning bidder if its bid was one of the top five bids when judged against the nationwide aggregated bids for each of the five GWCS channel blocks. In-Flight explains that this approach would reduce the risk that a nationwide applicant would be subject to an anticompetitive blocking action by a competitor, who otherwise might only need to bid on a single local license from the channels specified by the nationwide applicant to succeed in blocking the applicant's bid.¹¹⁵

70. In-Flight also contends that this approach would reduce any "free rider" benefits that otherwise might accrue to an applicant for a nationwide license under combinatorial bidding, because other bidders would not know on which channel block (or blocks) the combinatorial bidder would operate if it submits a winning bid.¹¹⁶

71. **Decision.** We do not adopt combinatorial bidding, but will establish reduced bid withdrawal penalties for entities seeking nationwide licenses that should achieve results similar to combinatorial bidding, with far less uncertainty and complexity. The record in this proceeding does not, in our view, provide a sound basis for adopting combinatorial bidding. The only comments on this issue were submitted as reply comments by In-Flight. These comments do not address adequately the practical problems with implementing combinatorial bidding for which we sought comment in the Second NPRM. The comments do not, for example, address the issue of whether we should limit combinatorial bids to nationwide licenses, in order to reduce the complexity of the auction, or whether a bidding premium should be required of combinatorial bidders, or whether "stand-by queue" mechanisms should be employed.¹¹⁷ Of greatest significance, the record does not provide an adequate basis for concluding that any specific combinatorial bidding scheme would not be biased toward either individual or combinatorial bidders, resulting in an inefficient outcome.

72. We also conclude that the increased risk a bidder faces in seeking to aggregate individual EA licenses in order to offer a nationwide service can be addressed by reducing the withdrawal penalty for the nationwide bidder. As we discussed in the Second NPRM, geographic aggregation is generally facilitated in a simultaneous auction, but a bidder whose business plan depends critically on winning every license on a particular block nationwide may nonetheless be at a disadvantage. This problem could arise because of the increased risk

¹¹⁵ In-Flight Reply Comments at 8-11.

¹¹⁶ In-Flight Reply Comments at 9-10.

¹¹⁷ See Second NPRM, at paras. 91-92

a nationwide aggregator may face if the total price of the aggregation rises above its value to that bidder, but the bidder is not outbid on all its high bids. The nationwide aggregator may then be forced either to withdraw its remaining high bids late in the auction, possibly incurring a bid withdrawal penalty, or to pay too much for the remaining licenses. This risk could discourage nationwide bidders from fully expressing the value of nationwide aggregations, causing the spectrum to go to lower valued uses.¹¹⁸

73. One way to address this concern is to modify auction rules to limit the risk associated with bid withdrawal for those seeking nationwide aggregations, while still discouraging insincere bidding. To accomplish this, we will limit the withdrawal penalty for nationwide bidders to 5 percent of the aggregate withdrawn bids. The withdrawal penalty would be calculated as the difference between the sum of the withdrawn bids and the sum of the subsequent high bids on the withdrawn licenses up to a maximum of 5 percent of the withdrawn bids.¹¹⁹ Calculating the penalty in this way will reduce the expected penalty because bidders will "get credit" for the amounts by which subsequent high bids exceed the prices at which bids are withdrawn. To discourage insincere bidding, nationwide bidders would be required to declare the number of nationwide aggregations for which they will bid and to be active in every round of bidding on sufficient licenses to create the number of declared aggregations. We describe these and other modifications to bid withdrawal penalties and auction activity rules for nationwide aggregations in Appendix E. While these changes to the withdrawal and activity rules must be somewhat complex to ensure a fair and efficient auction, they should nonetheless be far simpler and easier to administer than combinatorial bidding. This approach should also permit a speedier auction, especially because, as we pointed out above, no detailed, practicable combinatorial bidding plan has been proposed or developed in this proceeding.

d. Bidding Procedures

74. **Background.** We also sought comment in the Second NPRM on bidding procedures to be used in the 4660-4685 MHz auctions, including bid increments, duration of bidding rounds, stopping rules, and activity rules. Assuming that we would use simultaneous multiple round auctions, we generally proposed to use the same or similar bidding procedures to those used in simultaneous multiple round bidding for MTA-based PCS licenses.¹²⁰ We sought comment on whether any variations on these procedures should be adopted for licenses in the 4660-4685 MHz band.

¹¹⁸ Second NPRM, at para. 90.

¹¹⁹ This 5 percent cap on the bid withdrawal penalty will only apply to withdrawn bids on licenses that are part of the nationwide aggregation.

¹²⁰ See, e.g., Competitive Bidding Fifth Report and Order, 9 FCC Rcd at 5541-56, recon., Competitive Bidding Fourth Memorandum Opinion and Order, 9 FCC Rcd at 6859-64.

75. **Comments; Decision.** None of the comments addresses these bidding procedures issues, except with respect to designated entities, as we discuss in the next section of this Order. Based upon our successful experience in auctioning PCS spectrum and the absence of any dispute concerning the efficacy of the bidding procedures used there, we will adopt essentially the same procedures for GWCS licenses. We will describe these procedures briefly in this section of the Order. Additional, more detailed information on bidding procedures and other auction information will be made public prior to the auction.

2. Procedural and Payment Issues

76. In the Competitive Bidding Second Report and Order, as modified by the Competitive Bidding Reconsideration Order, the Commission established general procedural, payment, and penalty rules for auctions, but also stated that such rules may be modified on a service-specific basis.¹²¹ As discussed below, we will generally follow the procedural, payment, and penalty rules established in Subpart Q of Part 1 of the Commission's Rules.¹²²

a. Upfront Payments

77. As in the case of other auctionable services, we will require participants in the 4660-4685 MHz auction to tender to the Commission, in advance of the auction, a substantial upfront payment as a condition of bidding in order to ensure that only serious, qualified bidders participate in auctions and to ensure payment of the penalty (discussed *infra*) in the event of bid withdrawal or default. For GWCS, we adopt the standard upfront payment formula of \$0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding. We do not find it necessary to set a minimum upfront payment for these licenses.

b. Down Payment and Full Payment for Licenses Awarded by Competitive Bidding

78. The Competitive Bidding Second Report and Order generally required successful bidders to tender a 20 percent down payment on their bids to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs.¹²³ We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth and diminish access. We adopt this 20 percent downpayment requirement for 4660-4685 MHz GWCS licenses. Winning bidders will thus be required to supplement their upfront

¹²¹ See Competitive Bidding Reconsideration Order, 9 FCC Rcd at 7249-50, paras. 23-26.

¹²² 47 C.F.R. Part 1, Subpart Q.

¹²³ *Id.* at 2381-82, paras. 190-192.

payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).

c. Bid Withdrawal, Default, and Disqualification

79. We adopt the bid withdrawal, default, and disqualification rules for 4660-4685 MHz licensing based on the procedures established in our general competitive bidding rules.¹²⁴ Under these procedures, any bidder who withdraws a high bid during an auction before the Commission declares bidding closed, or defaults by failing to remit the required down payment within the prescribed time, will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if the subsequent winning bid is lower. One exception, as we discussed above, is that we will limit the bid withdrawal payments for nationwide bidders to 5 percent of the withdrawn bids. See ¶ 75 *supra*. A defaulting auction winner will be assessed an additional amount of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. In the event that an auction winner defaults or is otherwise disqualified, we will re-auction the license either to existing or new applicants. The Commission will retain discretion, however, to offer the license to the next highest bidder at its final bid level if the default occurs within five business days of the close of bidding.

3. Regulatory Safeguards

a. Unjust Enrichment Provisions

80. The Reconciliation Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."¹²⁵ We will adopt the transfer disclosure requirements contained in Section 1.2111(a) of our rules for all 4660-4685 MHz licenses obtained through the competitive bidding process. In addition, we adopt the specific rules governing unjust enrichment by designated entities, discussed below, as proposed in the Notice. Generally, applicants transferring their licenses within three years after the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license.

¹²⁴ See 47 C.F.R. § 1.2109.

¹²⁵ 47 U.S.C. § 309(j)(4)(E).

b. Performance Requirements

81. The Reconciliation Act requires the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."¹²⁶ In the Competitive Bidding Second Report and Order, we decided that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services.¹²⁷ Our 4660-4685 MHz service rules contain specific performance requirements, such as the requirement to construct and provide service within a specific period of time. Thus, we do not adopt any additional performance requirements for competitive bidding purposes.

c. Rules Prohibiting Collusion

82. In the Competitive Bidding docket, we adopted special rules prohibiting collusive conduct in the context of competitive bidding.¹²⁸ We indicated that such rules would serve the objectives of the Reconciliation Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. We will apply these rules to the 4660-4685 MHz service. Under these procedures, bidders will be required to identify on their applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships, or other agreements or understandings that relate to the competitive bidding process. Bidders will also be required to certify that they have not entered into any explicit or implicit agreements, arrangements, or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid.

4. Designated Entities

a. Introduction

83. In authorizing the Commission to use competitive bidding, Congress directed the Commission to advance various objectives and consider several alternative methods for

¹²⁶ 47 U.S.C. § 309(j)(4)(B).

¹²⁷ 9 FCC Rcd at 2386, para. 219.

¹²⁸ 47 C.F.R. § 1.2105(c). Competitive Bidding Second Report and Order, 9 FCC Rcd 2386-88, paras. 221-226; Competitive Bidding Reconsideration Order, 9 FCC Rcd at 7254, paras. 50-53; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Memorandum Opinion and Order, PP Docket 93-253, 9 FCC Rcd 7684, 7687-89, paras. 8-12 (1994).

achieving them. Specifically, the statute provides that, in establishing eligibility criteria and bidding methodologies, the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."¹²⁹ Small businesses, rural telephone companies and businesses owned by minorities and/or women are collectively referred to as "designated entities."¹³⁰ Section 309(j)(4)(A) provides that the Commission "shall consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments or other schedules or methods . . . and combinations of such schedules and methods."¹³¹ The statute also requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."¹³² To achieve that goal, the statute indicates that the Commission should "consider the use of tax certificates, bidding preferences, and other procedures."¹³³

84. In the Competitive Bidding docket, we established eligibility criteria and general rules that would govern the award of special provisions for designated entities. We also enumerated several possible special provisions that could be applied to designated entities in particular services, including installment payments, spectrum set-asides, bidding credits, and tax certificates. In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of these special provisions.

85. In keeping with the general parameters set forth in the Competitive Bidding docket, we proposed in the Second NPRM specific measures and eligibility criteria for designated entities in the 4660-4685 MHz service, designed to ensure that such entities are given the opportunity to participate both in the competitive bidding process and in the provision of service in the 4660-4685 MHz band. We sought comment on these proposals, and specifically on identifying special provisions tailored to the unique characteristics of the service or services that might be offered in the 4660-4685 MHz band, in order to create meaningful incentives and opportunities in the service for small businesses and businesses owned by minorities and/or women.

¹²⁹ 47 U.S.C. § 309(j)(3)(B).

¹³⁰ Competitive Bidding Second Report and Order, 9 FCC Rcd at 2388, para. 227.

¹³¹ 47 U.S.C. § 309(j)(4)(A).

¹³² 47 U.S.C. § 309(j)(4)(D).

¹³³ Id.

86. In the Second NPRM, we discussed and sought comment on these special provisions for designated entities:

- 1) for businesses owned by women and minorities we proposed that installment payments be available on all licenses and that a bidding credit of 25 percent be available on one of the five proposed spectrum blocks;
- 2) for small business we sought comment on allowing a reduced down payment requirement coupled with installment payments;
- 3) we did not believe that special preferences are needed to ensure adequate participation of rural telephone companies;
- 4) we sought comments on reducing upfront payments to encourage participation in the auction, particularly by all eligible designated entities; and
- 5) we sought comment on whether and how to designate one 5 MHz spectrum block as an "entrepreneurs' block."

We also discussed and solicited comments on issues of the eligibility criteria for designated entities and provisions to prevent unjust enrichment by trafficking in licenses acquired through the use of bidding credits or installment payments.

87. **Comments.** Commenters addressing methods of ensuring that designated entities will participate in an auction of 4660-4685 MHz spectrum primarily urge that licenses be awarded on geographic areas smaller than MTAs. Leaco states that "[i]f the licenses areas are smaller in size, rural telephone companies like Leaco would be able to acquire licenses without special considerations."¹³⁴ The SBA supports licenses on a smaller, Basic Trading Area basis because it requires less capital to obtain a license and construct an operational system. It states that "[l]arge service territories generally are appealing to large businesses and small firms have little chance of obtaining the financing needed to bid for MTA licenses absent special provisions."¹³⁵ ATI similarly supports smaller license areas than MTAs, and proposes entrepreneurial set-asides for small companies in order to "at least allow wireless cable operators to bid for spectrum in competition with other comparably smaller business entities."¹³⁶

88. To the extent that special provisions are needed for designated entities, SBA

¹³⁴ Leaco Comments at 7.

¹³⁵ SBA Comments at 5.

¹³⁶ ATI Comments at 6.

supports the adoption of bidding credits.¹³⁷ SBA and ATI urge in addition that bidding preferences for businesses owned by women and minorities should also extend to small businesses, which are also designated entities.¹³⁸ Leaco submits that rural telephone companies should be given all of the bidding preferences awarded to other entities.¹³⁹ Although SBA argues that bidding credits should apply to all small businesses, it notes that some differences in preferences for women and minorities may be appropriate to compensate for their greater difficulty in attracting capital than other small businesses.¹⁴⁰ WCAI believes that Congress's intent can best be served by permitting installment payments by small businesses in the same manner at the Commission did for PCS.¹⁴¹

89. Several commenters also support entrepreneurial blocks, especially if licenses are awarded on an MTA basis. SBA proposes an entrepreneurs' block for which all designated entities would be eligible so long as the entities' net worth was within the \$40 million net worth criteria established for the MTA narrowband PCS auction. SBA states that this definition is consistent with definitions adopted by the Commission for other services and approved by the SBA, that it isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises, and that these companies are sufficiently large that they could survive in a competitive wireless communications marketplace.¹⁴² ATI and WCAI also support \$40 million standard used for PCS as appropriate here.¹⁴³ ATI proposes an entrepreneurial set aside of at least two 5 megahertz channels.¹⁴⁴

90. **Decision.** Our plan to award licenses for the 4660-4685 MHz band based on EA regions, will substantially enhance the opportunities for designated entities to participate in the GWCS license auction. Partitioning of licenses will further increase the opportunities for designated entities. Based on our experience in the other auctions we have held to date, we are also adopting bidding and payment provisions that will help ensure that the auction assigns licenses to the bidders who value them most highly, while encouraging the participation of designated entities. Specifically, we will permit small business licensees to

¹³⁷ SBA Comments at 6.

¹³⁸ SBA Comments at 6, ATI Comments at 6.

¹³⁹ Leaco Comments at 12.

¹⁴⁰ SBA Comments at 6-7.

¹⁴¹ WCAI Comments at 9.

¹⁴² SBA Comments at 6.

¹⁴³ ATI Comments at 6-7; WCAI Comments at 9-11.

¹⁴⁴ ATI Comments at 6.

make their payments in installments computed at a reasonable rate of interest (the rate for ten year U.S. Treasury obligations plus 2.5 percent). Small businesses will in addition be permitted to make reduced down payments and interest-only payments in the first two years of the license term, and will be allowed a 10 percent bidding credit on all blocks of spectrum. We also adopt rules to prevent unjust enrichment from bidding preferences. We do not adopt an entrepreneurial set aside, but will apply the designated entity bidding preferences to all five spectrum blocks.

(1) Eligibility for Bidding Credits, Installment Payments, and Reduced Down Payments

91. We will limit eligibility for bidding credits, installment payments and reduced down payments to small businesses, including those owned by members of minority groups and women. Both the SBA and ATI encouraged the Commission to apply bidding credits to all small businesses. On the basis of this record, we lack the information necessary to set different eligibility criteria for minority and women-owned entities that do not meet our small business size standards in order to achieve the goals of Section 309(j) in the GWCS services.¹⁴⁵ By providing credits on all blocks, licensing the blocks based on EA geographic areas, and permitting disaggregation and partitioning, we will create substantial opportunities for all small businesses, including those owned by minorities and women. For example, as we pointed out in our NPRM for 900 MHz SMR licensing, U.S. Census Data shows that approximately 99 percent of all women-owned businesses and 99 percent of all minority-owned businesses generated net receipts of \$1 million or less.¹⁴⁶ Thus, we will capture the overwhelming majority of minority and women-owned businesses in the small business category.

92. On March 15, 1995, in response to a request filed by Telephone Electronics Corp (TEC) alleging that our rules violated equal protection principles under the Constitution, the U.S. Circuit Court for the District of Columbia issued an *Order* stating that "those portions" of the Commission's *Order* "establishing minority and gender preferences . . . for that auction shall be stayed pending completion of judicial review."¹⁴⁷ The court explained that TEC had

¹⁴⁵ The SBA proposed bidding credits for women and minorities from that would differ from credits available to small businesses, but provided no detailed support for their proposal. SBA Comments at 6-7.

¹⁴⁶ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking FCC 95-159, released April 17, 1995, at para. 135, fn. 192, citing Women-Owned Businesses, WB 87-1, 1987 Economic Census, p. 144, Table 8; Survey of Minority-Owned Business Enterprises, MB 87-4, 1987 Economic Census, pp. 81-82, Table 8..

¹⁴⁷ Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir. March 15, 1995) (order granting stay).

"demonstrated the requisite likelihood of success on the merits."¹⁴⁸ The stay, however, was subsequently lifted on May 1, 1995, on TEC's motion, after TEC decided to withdraw its lawsuit.¹⁴⁹ Most recently, the Supreme Court decided in *Adarand Constructors, Inc. v. Peña*¹⁵⁰ that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."¹⁵¹ The Court ruled that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.¹⁵² We believe that the holdings in *Adarand* and in the TEC case would affect any proposal to incorporate gender- and race-based measures into our GWCS auction rules and could potentially delay the provision of service to the public.¹⁵³ The effect of the various actions we have taken to reduce the capital requirements for operating GWCS services should also be of particular benefit to minority and women-owned businesses. Our experience in prior auctions suggests that installment payments are particularly successful in encouraging participation in spectrum licensing by businesses that have difficulty attracting capital, a common condition of minority and women-owned businesses.

93. **Small Business Definition.** The Second NPRM requested comment on whether we should utilize the SBA net worth/net income definition of a small business (a net worth not in excess of \$6 million with average net income after Federal income taxes for the preceding years not in excess of \$2 million) we adopted in the Competitive Bidding Second Report and Order¹⁵⁴ or, in the alternative, a gross revenue standard like that used in the broadband PCS context (average gross revenues for the three preceding years not in excess of \$40 million). We also proposed to apply the same affiliation and attribution rules for calculating revenues that we have previously adopted in the PCS context.

94. **Comments.** The SBA believes that a definition of small businesses as those with less than \$40 million in revenues is appropriate to be consistent with definitions previously

¹⁴⁸ *Id.* at 2.

¹⁴⁹ Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir March 15, 1995) (order granting dismissal of petition for review).

¹⁵⁰ 63 U.S.L.W., No. 93-1841 (U.S. June 12, 1995).

¹⁵¹ 63 U.S.L.W. at 4530.

¹⁵² *Id.* at 4533.

¹⁵³ Under Section 309(j)(3)(A) of the Communications Act, the Commission's design for competitive bidding shall seek to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays."

¹⁵⁴ See Competitive Bidding Second Report and Order, 9 FCC Rcd at 2390, para. 238.

adopted by the SBA and the Commission, as well as to isolate those companies that have significantly greater difficulty in obtaining capital, but also are sufficiently large that they could survive in a competitive wireless communications marketplace. It considers survivability "particularly critical" where, as here, the market is not well-defined.¹⁵⁵ ATI proposes that the Commission apply revenue and asset criteria such as those established by the Commission for eligibility to bid for the Block C and F Broadband PCS allocations (i.e., gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million.)¹⁵⁶ WCAI states that because at least some of the services that may be offered over the band will be PCS-like and require capital expenditure on the same order as PCS, use of the same eligibility requirements is appropriate.¹⁵⁷

95. **Decision.** Our decision to base GWCS licenses on EAs, rather than the larger MTAs, will substantially reduce the capital costs of acquiring GWCS licenses and constructing operational systems. In this case, however, it seems likely that there will be a greater range of license sizes, from the local EA-like areas to regional and, possibly, national license aggregations. The capital costs of operational GWCS facilities are thus likely to vary widely as well. The flexibility to aggregate or disaggregate licenses may stimulate other license configurations. Overall, the capital requirements of this service may be similar to broadband PCS and we will adopt the small business definition adopted there, namely any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of \$40 million. We also apply to 4660-4685 MHz applicants the same affiliation and attribution rules for calculating revenues that we have previously adopted in the PCS context.

(2) Installment Payments and Down Payments

96. We believe that ensuring the opportunity for small businesses to participate in providing service in the 4660-4685 MHz band is important for the telecommunications industry. The record in the Competitive Bidding docket indicates that small businesses have not become major participants in telecommunications.¹⁵⁸ The record in that docket also shows that small businesses have particular difficulties obtaining capital.¹⁵⁹ Payment and bidding procedures that reduce capital outlays and risks are thus especially likely to enhance the opportunities and ability of small businesses to participate successfully in spectrum auctions.

¹⁵⁵ SBA Comments at 6.

¹⁵⁶ ATI Comments at 3-4.

¹⁵⁷ WCAI Comments at 7.

¹⁵⁸ See Competitive Bidding Fifth Report and Order, 9 FCC Rd at 5578, para. 108.

¹⁵⁹ Id. at 5573, para. 97. The findings made and discussion in the Competitive Bidding Fifth Report and Order on this subject are incorporated here by reference.

As we discussed in the Second NPRM, it appears that installment payments may have been more effective than bidding credits in attracting capital in the regional narrowband PCS auction, possibly because installment payments shift some of the financial risk of future failure to the Government.¹⁶⁰ Therefore, we adopt installment payments for any GWCS licensee meeting the definition of a small business.

97. Under this approach, small business licensees may elect to pay their winning bid amount (less upfront payments) in installments over the ten year term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten year U.S. Treasury obligations plus 2.5 percent. Installment payments would be due quarterly on the anniversary of the day the license was granted. Timely payment of all installments would be a condition of the license grant and failure to make such timely payments would be grounds for revocation of the license.

98. We will also adopt additional payment preferences to further reduce the capital needs of small businesses. Small business licensees will be permitted to make interest-only installment payments during the first two years of the license.¹⁶¹ We also reduce down payments for small businesses to 5 percent of the winning bid due five days after the auction closes and the remaining 5 percent down payment due five days after Public Notice that the license is ready for grant.

(3) Bidding Credits

99. In the Second NPRM, we proposed a 25 percent bidding credit on one of the five proposed spectrum blocks for small businesses owned by women and minorities. These bidding credits would be available exclusively to minority and women-owned businesses. We also proposed installment payments for these entities and sought comment on whether installment payments should also be available for small businesses. We did not believe that special preferences were needed to ensure adequate participation of rural telephone companies in the provision of services in this spectrum, in view of the uncertainty concerning what specific uses may emerge in this band, the potential prices that licenses may bring, the effects of provisions for partitioning or leasing spectrum, and the advantages of incumbency and economies of scale that may already benefit rural telephone companies. We sought comment on this analysis.¹⁶²

100. **Comments.** Leaco urges that, if the Commission uses MTA geographic licensing areas, rural telephone companies should be given all of the bidding preferences awarded to other designated entities, including bidding credits, installment payments, and reduced upfront

¹⁶⁰ Second NPRM at para. 109.

¹⁶¹ See, e.g., Competitive Bidding Fifth Report and Order at para. 138-39.

¹⁶² Second NPRM at para. 104-115.

payments.¹⁶³ The SBA opines that the same rationale for awarding bidding credits - the difficulty in raising capital and the low participation by small business in wireless telecommunications - militates against limiting the bidding credit to women and minority enterprises. It supports a 25 percent bidding credit for women and minorities and a 10 percent bidding credit for small businesses.¹⁶⁴

101. **Decision.** We adopt a 10 percent bidding credit for all small businesses. As discussed above, we are adopting installment payments for small business bidders and the small EA geographic licensing areas. These changes will substantially reduce the capital costs of acquiring local GWCS licenses and providing service. Such changes should be of particular benefit to small businesses and rural telcos. In our judgment, these and other provisions of the licensing and auction rules should ensure that small businesses will be able to participate effectively in obtaining GWCS licenses, whether or not those licenses are auctioned.

102. We remain concerned that small businesses, including those owned by women and minorities, will find it difficult to obtain the capital to compete effectively in GWCS auctions against large corporations and small telephone companies, with their potential advantages in incumbency and economies of scale in using existing facilities. To address these inequalities, we will adopt a 10 percent bidding credit for small businesses. This credit is smaller than the 25 percent for a single spectrum block we had proposed originally, and smaller than the credits we have adopted for other services. We find it reasonable in view of other revisions to our proposed rules which will benefit designated entities, including the EA-based license areas and the availability of installment payments. We are also widening the scope of the bidding credit by permitting eligible entities to apply the credit to all GWCS licenses. Taken together, we believe that these bidding preferences will carry out the Congressional intent and provide designated entities, including small businesses owned by women and minorities, with a meaningful opportunity to obtain GWCS licenses.

(4) Transfer Restrictions and Unjust Enrichment Provisions

103. Restrictions on the transfer or assignment of licenses acquired by designated entities are intended to promote the Congressional intent that designated entities be permitted to participate in the provision of spectrum-based services,¹⁶⁵ not simply to profit from trafficking in licenses acquired with the help of bidding preferences. In the Second NPRM, we proposed a payment requirement on transfers of such licenses to entities that are not DEs. DEs seeking to transfer a license to an entity that is not a DE would be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer would be

¹⁶³ Leaco Comments at 12-14.

¹⁶⁴ SBA Comments at 6-7.

¹⁶⁵ See 47 U.S.C. § 309(j)(4)(D).

permitted. The amount of the penalty would be reduced over time so that a transfer in the first two years of the license would result in a payment of 100 percent of the value of the bidding credit; in year three of the license term the payment would be 75 percent; in year four the penalty would be 50 percent and in year five the payment would be 25 percent, after which there would be no payment.¹⁶⁶

104. **Decision.** There were no comments on this issue. We adopt the proposed transfer restrictions as a reasonable means of ensuring that bidding preferences are used by designated entities as the statute intends. Because the bidding preferences we are adopting apply to all small businesses, the transfer restrictions will similarly apply to small businesses that transfer licenses acquired with the assistance of bidding preferences to entities that are not small businesses under the definition we are adopting for GWCS.

(5) Rural Telephone Company Partitions

105. In the Second NPRM we proposed to permit partitioning of MTA-based licenses, to permit licensees to lease the rights to operate a GWCS system within portions of their geographic service area or transfer their license to partition their service areas geographically, allowing another party to be licensed in the partitioned area, subject to Commission approval.¹⁶⁷ Leaco and SBA both recommended licensing of geographic areas smaller than MTAs, while also supporting partitioning if MTAs were adopted.¹⁶⁸ Leaco also urges that winning bidders be given the flexibility to subdivide and license the market to another entity regardless of the size of the geographic service areas selected by the Commission.¹⁶⁹ We believe that, even with license blocks based on the smaller EA regions, partitioning may help provide additional opportunities for small businesses to participate in providing GWCS-based services to customers. We will therefore adopt partitioning procedures for rural telephone companies similar to those used for cellular licenses and adopted for broadband PCS licenses. We adopt the definition of a rural telephone company in Part 1, Subpart Q of our Rules, *viz.*, any local exchange carrier including affiliates with 100,000 access lines or fewer.¹⁷⁰

(6) Entrepreneurs' Block

106. Our Second NPRM sought comment on whether to designate one 5 MHz spectrum block as an "entrepreneurs" block. We were concerned that, even considering the

¹⁶⁶ Second NPRM at para. 110.

¹⁶⁷ Second NPRM at para. 80.

¹⁶⁸ SBA Comments at 3, Leaco Comments at 10-11.

¹⁶⁹ Leaco Comments at 13.

¹⁷⁰ 47 C.F.R. § 1.2110(b)(3).

special provisions proposed for designated entities, those entities would have difficulties competing for 4660-4685 MHz licenses against large firms with significant financial resources. We also sought comment on how eligibility for such a block should be defined.¹⁷¹

107. **Comments.** The SBA favors an entrepreneurs' block open for all designated entities who do not exceed the small company definition established for the MTA narrowband PCS auctions.¹⁷² ATI proposes an entrepreneurial set-aside of at least two 5 MHz, which it says would at least allow wireless cable operators to bid for spectrum in competition with other comparably smaller business entities.¹⁷³ WCAI similarly proposes setting aside two 5 MHz channels, because many of the services contemplated for the band will require more than 5 MHz.¹⁷⁴

108. **Decision.** We have decided not to adopt an entrepreneurs' block for this band. The large number of GWCS licenses that will be available, the relatively small geographic license areas, the flexibility of license aggregation and partitioning, the installment payment option, and the bidding credits for all blocks should stimulate extensive opportunities for participation in GWCS licensing by designated entities, including small businesses. In addition, due to the range of possible services that licensees may provide, the size of any effective set-aside is unclear. WCAI and ATI suggest that a single 5 megahertz block would not be adequate for some GWCS services. To the extent this is the case, a set-aside of one 5 megahertz block may be ineffective in facilitating participation of designated entities in GWCS licensing while barring other potential licensees from making efficient use of this band. On the other hand, a larger set-aside might make adequate spectrum available for designated entities, but preclude use of the spectrum by other potential licensees seeking to provide other services.

109. A single nationwide set-aside may also impede efficient use of this spectrum in different regions of the country where the band may be best suited to different uses. Set-asides also would tend to undercut a basic goal of GWCS, that of establishing a flexible spectrum block that will encourage the introduction and development of new technologies and services. A set-aside of spectrum for one set of licensees would prevent others from using the spectrum for new technologies and services, while discouraging them from undertaking the necessary research and development.

110. In sum, we believe that bidding credits, installment payment options, and the other approaches we have adopted will generate sufficient incentives to encourage

¹⁷¹ Second NPRM at para. 118-19.

¹⁷² SBA Comments at 5-6.

¹⁷³ ATI Comments at 6, Reply Comments at 4.

¹⁷⁴ WCAI Comments at 6-7.

participation in GWCS licensing by small businesses. Unlike a set-aside, they also should not generate the risk of inefficient use of the 4660-4685 MHz spectrum and of dampening incentives for innovation.

H. Technical Rules

111. **Background.** In the Second NPRM we proposed general and minimal technical restrictions that are based on the PCS rules. Specifically, we proposed to limit the field strength at licensees' service area boundaries to 55 dBu unless licensees operating in adjacent areas agree to higher field strengths along their mutual border.¹⁷⁵ We stated that licensees would be expected to coordinate their operations at the service area boundaries. Unlike PCS, where we require the power of any emission outside of the licensee's frequency block to be attenuated below the transmitter power (P) by at least 43 plus $10\log_{10}(P)$ or 80 decibels, whichever is less, we did not propose to establish adjacent-channel interference limits at the frequency boundaries between licensees in this band. Instead, we stated that we would encourage licensees to resolve adjacent channel interference problems. We did, however, propose to require licensees to attenuate the power below the transmitter power (P) by at least 43 plus $10\log_{10}(P)$ or 80 decibels, whichever is less, for any emission at the edges of the 4660-4685 MHz band. We requested comment on these proposals and any other technical rules that commenters believe are appropriate.

112. **Comments.** Leaco agrees with our proposed approach to establish flexible technical rules in the GWCS band. However, Leaco argues that rural and urban areas present different requirements and suggests allowing licensees to request waivers of any technical rules adopted.¹⁷⁶ WCAI echoes the merits of flexible technical standards.¹⁷⁷ Bell Atlantic agrees that the PCS rules provide the best model and opposes the specification of a maximum transmitter power restriction as long as licensees do not exceed the maximum permissible field strength at the border of their licensed areas.¹⁷⁸ In its comments opposing GWCS, MSTV states that the vagaries of the GWCS service, such as what technical standards will apply and what geographic range is possible, will prevent prospective users from making rational investment decisions and manufacturers from developing the appropriate equipment.¹⁷⁹

¹⁷⁵ The minimum field strength required for a good quality service for mobile reception in an urban environment is 35 dBu (CCIR Report 358-5) and the proposed 55 dBu field strength limit allows 20 dB additional for location variability.

¹⁷⁶ Leaco Comments at 14.

¹⁷⁷ WCAI Comments at 4.

¹⁷⁸ Bell Atlantic Comments at 5.

¹⁷⁹ MSTV Comments at 13-14.

113. **Decision.** Based on the record, we are adopting the technical rules as proposed in the Second NPRM. The PCS-based technical rules appear to be the best available rules to govern the GWCS designation. However, we recognize that the technical rules may need to be adjusted to suit the needs of the licensees if the ones we adopt prove to be insufficient. As proposed in the Second NPRM, we expect that in the first instance licensees will seek to resolve any interference at their borders among themselves.

I. License Term

114. **Background.** The Communications Act allows the Commission to establish a license term of up to 10 years, except for television or radio broadcasting stations, which may have a license term of up to 5 and 7 years, respectively.¹⁸⁰ For services in the 4660-4685 MHz band, we proposed to establish a license term of 10 years, with a renewal expectancy similar to that of PCS and cellular telephone licensees. We stated in the Second NPRM that this relatively long license term, combined with a high renewal expectancy, should help provide a stable regulatory environment that will be attractive to investors and, thereby, encourage development of this new frequency band. We noted, however, that commenters have proposed using this band for auxiliary broadcast service and the statute requires that the term of any license for the operation of any auxiliary broadcast station or equipment must be concurrent with the term of the license for such primary television station.¹⁸¹ Therefore, we asked that commenters address whether we should allow differing license terms in this band.

115. **Comments; Decision.** We received only two comments concerning the license term. Leaco¹⁸² and MSTV¹⁸³ both support a 10 year license term. We adopt a 10 year licensing term for GWCS. This period is supported by the comments and, as we discussed in the Second NPRM, should provide a stable regulatory environment that will attract investors and encourage the development of this new band. We also conclude that a GWCS licensee that provides a broadcast auxiliary-type service will not generally be subject to the limited license term of a radio or television station license. Under Section 307(c), the limitation of a broadcast auxiliary license term to the period of the term of a primary station only applies where the auxiliary license is "for the operation of any auxiliary broadcast station or equipment which can be used only in conjunction with a primary radio, television, or translator station." Broadcast auxiliary operations are generally managed by coordinators on behalf of various eligible broadcast stations, not limited to a primary station. Therefore, the statutory provision that requires a shorter license term will generally not apply, except in the case of an applicant seeking to use GWCS for auxiliary broadcast use by a single station,

¹⁸⁰ 47 U.S.C. § 307.

¹⁸¹ 47 U.S.C. § 307(c).

¹⁸² Leaco Comments at 15.

¹⁸³ MSTV Comments at 19.

within the meaning of Section 307(c).

J. Construction Requirements

116. **Background.** In the Second NPRM we acknowledged that the very wide array of potential services that could be offered in this band makes it difficult to develop construction requirements that can be applied fairly and equitably, without skewing the workings of the market. We also recognized our responsibility to ensure that the spectrum we assign is used effectively. Therefore, we proposed to require build-out rules modeled on those adopted for broadband PCS. Specifically, we proposed that within five years, licensees in this band offer service to one-third of the population in the area in which they are licensed. Further, licensees would have to serve two-thirds of the population in the area in which they are licensed within ten years of being licensed. We stated that failure by any licensee to meet these construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it. We requested comment on whether these requirements are appropriate for private radio licensees that may not have to serve particular population segments within their service areas. In addition, we asked for comment on whether the Commission should establish a licensee defined service area, such as a cellular geographic service area (CGSA) which would allow the Commission to license areas to a different party when the existing licensee has not constructed. We stated that such a proposal might encourage licensees to cover a larger geographic area or allow a new licensee to provide a service where the existing licensee believes that it is uneconomical to provide service in that area.

117. **Comments.** Leaco strongly urges the Commission not to adopt population-based service benchmarks, arguing that such benchmarks would provide no incentive for licensees to offer service to large rural areas of the country. Leaco instead proposes that construction deadlines be based on geographic area rather than population. Leaco submits that the Congressional requirement to ensure service to rural America can be met only if all licensees are required to relinquish their rights to serve any portion of their licensed markets which are unserved at the end of five years.¹⁸⁴

118. Bell Atlantic, on the other hand, urges the Commission not to prescribe deadlines for construction. Bell Atlantic states that the successful bidder's incentive to earn a return on its investment as early as possible provides enough incentive to use the spectrum in the most technically and economically efficient manner. Bell Atlantic further asserts that the flexible GWCS allocation policy for this spectrum reduces the need to impose a construction schedule, and that the proposed "aggressive" construction schedule may constrain licensees from using at least part of the spectrum for truly innovative technologies that may require longer lead times.¹⁸⁵

¹⁸⁴ Leaco at 15.

¹⁸⁵ Bell Atlantic Comments at 5-6.

119. PCIA states that the implementation of geographic or population build-out requirements as proposed are inappropriate for private user systems. PCIA asserts that, for private users constructing systems to meet their own needs, it would not be spectrally efficient or cost effective to require that systems be built where there is no need for service.¹⁸⁶

120. In reply comments, In-Flight states that longer construction deadlines encourage speculators. In-Flight proposes that the Commission require that each GWCS licensee provide service to at least 70 percent of the population within its service area within three years of the license grant date and at least 85 percent of the population within five years of the grant data.¹⁸⁷

121. **Decision.** We will adopt the proposed build-out rules, modeled on those adopted for broadband PCS.¹⁸⁸ These rules will require that within five years licensees in this band offer service to one-third of the population in the area in which they are licensed, and to serve two-thirds within ten years of being licensed. These requirements should conform with the Act's direction that we "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."¹⁸⁹ Our adoption of EA-based licensing areas should largely moot Leaco's concerns that population-based build-out rules will not ensure that service will be provided in rural areas. We also believe that these rules, with their five and ten year deadlines, provide adequate time for licensees to develop and offer services. They also should not discourage the introduction of new services that can often be expected to use the in-place wireless infrastructure. We will consider waivers or modifications of the build-out rules based on demonstrations that the spectrum is being used efficiently, not warehoused or stockpiled. Failure by any licensee to meet the construction requirements will result in forfeiture of the license and the licensee will be ineligible to regain it. Overall, we believe that the broadband PCS-based standards strike a reasonable balance by allowing flexibility for licensees while implementing the goals and directives of the Act.

K. Regulatory Status

122. **Background.** The Communications Act and Commission rules often apply differing requirements based on the type of service and the regulatory status of licensees. For

¹⁸⁶ PCIA Comments at 4-5.

¹⁸⁷ In-Flight Reply Comments at 3-5.

¹⁸⁸ [Cite].

¹⁸⁹ 47 U.S.C. § 309(j)(4)(B).

example, the Reconciliation Act created new statutory categories for mobile services: commercial mobile radio service (CMRS) and private mobile radio service (PMRS).¹⁹⁰ The Reconciliation Act provides that CMRS providers are treated as common carriers, but allows the Commission the authority to forbear from applying certain sections of Title II.¹⁹¹ For Fixed services, the Commission applies a judicial standard for determining whether a licensee is providing a common carrier service.¹⁹² The Commission does not have express statutory authority to forbear from applying any provisions of Title II to fixed service common carriers.

123. The new GWCS category for the 4660-4685 band would allow licensees to provide a variety or combination of Fixed and Mobile services. Under this service, both Fixed and Mobile applications would be permitted and an individual licensee could provide a number of Fixed and Mobile services. In the Second NPRM, we observed that it may be difficult to determine the regulatory status of GWCS licensees. We proposed to rely on applicants to identify specifically the type of service or services they intend to provide, and require them to include sufficient detail to enable the Commission to determine if the service will be Fixed or Mobile, and whether it will be offered as a commercial mobile radio service, a private mobile radio service, a common carrier Fixed service, or a private Fixed service. We requested comment on the most efficient manner in which to administer the requirements of the Communications Act and our rules, and grant licensees as much operational flexibility as possible.¹⁹³

124. We also solicited comments on whether the Commission should develop a new application long form for this general allocation or require an applicant to be responsible for filing the appropriate license application based upon the nature of the service designated by the applicant. Based on the showing made in the application form and actual service provided, the licensee would be subject to those rules and statutory requirements that apply to such service. We also requested that commenters address whether it is necessary for the Commission to require licensees to notify the Commission if they change the type of service offered using some or all of their licensed spectrum even though the new use would be permissible under our rules.¹⁹⁴

¹⁹⁰ 47 U.S.C. § 332(d)(1). See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994) (CMRS Second Report and Order).

¹⁹¹ Specifically, the Commission may forbear from applying any section of Title II, except Sections 201, 202, and 208. Communications Act, § 332(c)(1)(A).

¹⁹² See National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 642 (D.C. Cir.), cert. denied, 425 U.S. 999 (1976).

¹⁹³ Second NPRM at para. 125-126.

¹⁹⁴ Second NPRM at para. 127.

125. **Comments.** The only comments addressing this issue were filed by Leaco. Leaco believes that Commission rules give fairly clear definitions for fixed, mobile, private carrier, or common carrier service. However, mobile services are sometimes used on an ancillary basis as fixed services. Leaco states that, as a practical matter, neither the licensee nor the Commission can easily determine whether cellular mobile phones are being used as a fixed or mobile service. Leaco suggests that licensees initiating a new GWCS service first file a letter notifying the Commission of the proposed service. The notification letter should be filed fifteen days before the licensee files its regular application for service. The Commission, under Leaco's proposal, would have fifteen days to review the licensee's proposal and notify the licensee if the characterization of the service is inaccurate. Leaco reasons that this intermediate step would allow more flexibility and save the licensee and Commission staff time in processing inappropriately filed applications.¹⁹⁵

126. **Decision.** We will adopt the proposed approach of relying on applicants to identify the type of GWCS service or services each will provide, with sufficient detail to enable the Commission to determine the applicant's regulatory status. This approach should allow us to carry out our responsibilities while imposing minimal regulatory requirements upon licensees. Leaco's proposal that licensees seeking to initiate a new GWCS service file a separate letter 15 days prior to its regular application for service would add another procedural step for both licensees and Commission staff. The proposed added step would usually be unnecessary and would tend to delay the offering of new services. We believe that it would be in the public interest to develop an application form for the new service. Leaco's comments convince us that requiring applicants to determine the appropriate application to file based on the intended service offering would cause confusion and administrative burdens for GWCS applicants. By developing a standard application form, we should be able to minimize administrative burdens and delay while collecting necessary information. Consolidating regulatory status matters with other issues that might be raised in applications should also provide a fair opportunity for any party in interest to raise relevant issues in a petition to deny the application.¹⁹⁶ To clarify and simplify the regulatory status of licensees, we will also adopt a presumption that GWCS licenses are providing fixed common carrier services, which appears from the record to be the most likely and common use of this spectrum. This presumption may be rebutted by an appropriate showing. We delegate to the Wireless Telecommunications Bureau authority to develop forms appropriate to collect this data, and to monitor changes in licensee status.

L. Licensing Issues

127. We requested comment in the Second NPRM on whether the Commission is required or should find that it is in the public interest to adopt additional licensing rules in

¹⁹⁵ Leaco Comments at 16-17.

¹⁹⁶ See 47 U.S.C. § 309(d)

order to comply with the statutory requirement that we adopt assignment rules before August 10, 1995. For example, Section 309(b)(1) of the Communications Act requires all applications for common carrier station authorizations (other than minor amendments excepted under Section 309(c)) to be placed on public notice for 30 days prior to grant, and Section 309(d) allows petitions to deny to be filed against such applications during the public notice period. Because some licensees may provide common carrier service, we sought comment on whether the Commission should adopt public notice and petition to deny procedures for some or all applicants in the 4660-4685 MHz band. If we adopted such procedures, we proposed to use rules similar to those contained in Section 22.130 of our Rules. We also sought comment on whether to adopt rules regarding the amendment of applications and/or license modifications.

128. Finally, we requested comments on whether any existing application or regulatory fees would apply if we develop a new service. In addition, we noted that Section 310(d) of the Communications Act provides that no construction permit or station license may be transferred, assigned, or otherwise disposed of without Commission approval based on a finding that the public interest, convenience, and necessity will be served by the transaction. We sought comment on specific rules we should adopt in order to implement this provision of the Communications Act for purposes of licensing services in the 4660-4685 MHz frequency band.

129. **Comments.** Leaco states that initial applications for any service in the GWCS band should be subject to the public notice requirements of Section 309(d) of the Act and the transfer/assignment requirements of Section 310(d). It recommends that initial applications for any service in the GWCS band be placed on public notice for 30 days prior to grant to allow interested parties to file petitions to deny, a procedure that would allow the public to comment on whether the proposed service has been properly classified and its regulatory status.¹⁹⁷

130. **Decision.** At present, it appears unnecessary to adopt additional license rules for GWCS. We will follow the statutory provisions of Section 309(d) for public notice and other requirements. With respect to other licensing issues, we will consider whether any additional rules are necessary, and what form those rules should take, after we have proceeded with the application and licensing process. We should at that time have a more detailed understanding of the services licensees intend to provide and their regulatory status.

IV. ORDERING CLAUSES

131. Accordingly, IT IS ORDERED that Part 26 of the Commission's Rules is added as set forth in the attached Appendix D. This action is taken pursuant to Sections 4(i), 303(r), 309, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309, and 332.

¹⁹⁷ Leaco Comments at 17.